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Supreme Court of the United States

OCTOBER TERM, 1940

No. 935

FIRST NATIONAL BANK OF TEMPLE,
Petitioner,

vs.

CONTINENTAL CASUALTY COMPANY

Brief in Support of Petition for Writ of Certiorari

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Brief in Support of Petition for Writ of Certiorari

Opinions Below

The opinion of the Circuit Court of Appeals on the first appeal is reported in 100 F. (2d) 308 (cert. den., *Continental Casualty Company vs. First National Bank of Temple*, 307 U.S. 630, 59 S. Ct. 833); the opinion in question was rendered on January 17, 1941, and is found of record at page 457, and reported in 116 F. (2d) 885.

Jurisdiction

The statutory provision sustaining jurisdiction is Section 240 of the Judicial Code, as amended Feb-

ruary 13, 1925, being Section 347a, Title 28, U.S.C. A. Certiorari should be granted under Rule 38, paragraph 5. There was a diversity of citizenship, and because of the conflicting decisions of the same Circuit Court of Appeals in the same case, upon the same questions; and because the Circuit Court's decision on the second appeal is in direct conflict on the same questions with prior decision of this Court and other Circuit Courts of Appeals, and is contrary to the federal rule of decision announced by this Court and such other Circuit Courts of Appeals, all questions presented are federal. The date of the judgment of the Circuit Court of Appeals is January 17, 1941, and the petition for rehearing was denied on February 11, 1941 (R. 484). A full statement disclosing jurisdiction has been made by petitioner in its petition shown at pages 4 to 9, and for brevity is here adopted by reference.

Statement of the Case

Suit was upon a fidelity bond for ten separate items of loss sustained by the dishonest acts of three of petitioner's employees. This is the second appeal of the case; and the second application for Certiorari. On the first appeal, the Circuit Court reversed the judgment of the trial court based upon an instructed verdict for bonding company (100 F. (2d) 308) and petition for certiorari was denied (307 U.S. 630, 59 S. Ct. 833). At the second trial, the same witnesses testified, and in addition auditor Roberts testified for petitioner. The same documentary evidence was offered, and the same confessions and admissions of

the defaulting employees were introduced, and there was a plaintiff's verdict for $17,769.89 (R. 30).

On the second appeal, the Circuit Court destroyed (116 F. (2d) 885 R. 457) its former judgment, without holding it manifestly wrong in any particular, and reversed plaintiff's judgment, holding, importantly, that the trial court committed reversible error (R. 460) in permitting the experts to testify that the effect of the abstractions by petitioner's employees upon its affairs was to reduce the assets by the amount of the withheld deposit slips, because that was an ultimate issue for the jury, and the jury was probably misled thereby into assuming that if they believed such testimony they might render a plaintiff's verdict, and holding, also, that the trial court (R. 460) erred in charging the jury that the testimony of the experts was admissible "as relating to a matter that the jurors will themselves have to arrive at and determine, and in arriving at such determination you will take into consideration the testimony of all witnesses, including the testimony of all witnesses to whose testimony you will give credence, including those who were allowed to testify as experts, as to whether or not a direct loss was sustained by the bank at the time and within the period alleged herein of the ten items, and while the bond was in effect. This matter is an issue for your ultimate determination, based upon all of the testimony offered on trial of the cause." (R. 460).

The Circuit Court also held that a fair inter-

pretation of the language of the bond, as applied to the case, required plaintiff below, as a condition to recovery, to establish an *actual present loss* (R. 459).

The first item of loss, that of employee Lastovica, was a cash cage shortage by him twice confessed (R. 165-177), and fully corroborated by the national bank examiner who discovered the abstraction (R. 163). This loss had nothing to do with the suppression of deposit tickets. Eight of the remaining nine items involved him and two other employees who concealed their abstractions by suppressing customers' deposit slips. The last item came from an unauthorized charge of customer's account (R. 210).

At the second trial, it was stipulated that on and prior to April 6, 1933, the First National Bank in Temple was engaged in a banking business; that on or about that date a conservator was placed in charge of its assets by the Comptroller of Currency; that on or about September 13, 1933, said bank entered into an agreement with petitioner to sell its assets (R. 76); that in the sale contract it was provided that the purchaser assumed the seller's known existing liabilities shown upon the individual and general ledger sheets and current bills payable (R. 82); that *at eight o'clock A. M. on September* 23, 1933, conservatorship of old bank was closed by Comptroller, it wholly ceased business, and delivered its assets to purchaser, and on that date, by license of that date, issued by the Treasury Department (R. 154), petitioner opened for business, that on *September* 22, 1933, one day prior to petitioner's open-

ing, bonding company issued to it a continuous banker's blanket bond of fidelity insurance dated *September* 22, 1933, effective as of date of issuance; that such bond remained in force until after all transactions complained of had occurred, after which it was mutually terminated, and that bonding company had not at any time issued to petitioner's predecessor bank, or to the conservator, any bond (R. 77). It was further stipulated that prior to conservatorship, old bank had in its employ three employees, one of which was continued in the employ of the conservator, and that immediately upon opening its doors on September 23, 1933, said three employees went into petitioner's service, as officers and employees, and remained until the losses were discovered about April 7, 1935 (R. 76); and that these three employees were convicted of charges of making false entries as a result of prosecutions in the identical court where the civil case was tried, growing out of the identical transactions involved in this suit (R. 79, et seq). All the evidence showed (Lastovica, R. 165-177; Davis, R. 226; Glass, R. 208, 214, 258, 261, 271, 272, 275-6; Upleger, R. 333 to 338 and 339, 347, 349, 350 and 351; Roberts, R. 315, 317; Hooper, R. 239; and bonding company's auditor Templeton, R. 414, 415, 416, 417) that losses came into petitioner's bank on and after its opening date and while the bond was in force. All three of the employees admitted the dishonest taking of petitioner's money, after it opened for business and while the bond was in force, and detailed manner of abstraction (R. 165, 177; 226; 276). One twice con-

fessed, in writing (R. 165, 177), another took the stand and confessed (R. 226) and the third (R. 276) told a national bank examiner, examining petitioner's bank, of his shortage, and produced the supporting documents and withheld credits. These confessions, admissions and the supporting documents were in evidence. In addition, it was undisputed that in each instance, petitioner had been forced to pay out to its customers the amounts of money which its employees had taken, and had admitted taking. The evidence, other than the experts' testimony, came from four sources— (1) the documentary evidence, (2) the evidence developed at the hearing before the auditor appointed by the court, (3) parts of the evidence adduced upon the criminal trials of the employees, and (4) the confessions of the employees, all introduced by stipulation of the parties. It was and is petitioner's position that without resort to any testimony of any expert, the overwhelming preponderance of the evidence established that it had sustained direct losses after its opening date and during the effective currency of the bond.

Upleger, an expert certified public accountant of long experience, because of the complicated nature of the items of loss and connected matters, was appointed auditor by the trial court to examine the accounts and condition of petitioner, the old bank, and the claim. He was assisted in his work by certified public accountant Roberts (R. 305). Glass was a national bank examiner who first discovered the losses. Hooper was an auditor employed to determine losses. These experts, whose qualifications

were not denied, testified for petitioner. Templeton, who was not a certified public accountant, was the auditor employed by the bonding company, and testified in its behalf (R. 413). All experts concurred in the opinion that plaintiff's losses came into existence on and after its opening date, which was one day after the issuance of the bond, *and before the bond was terminated by mutual consent.* Upleger and Roberts spent several months in examining the accounts and condition of the affairs of the petitioner, under the court's authorization. Conformable to the trial court's order, Upleger heard the testimony of many witnesses, including the confessions and admissions of the three employees, who had been convicted of making false entries in petitioner's books upon the same matters involved in the bond suit. Auditor Hooper had worked on preparation of the claim for several months, at which time he had before him all necessary records, including the general ledger, subsequently lost (R. 221). The testimony of accountant Roberts that the general ledger was not required to trace petitioner's losses was not disputed (R. 318).

Thus it is clear that the opinion of the experts as to the origin, extent and amount of petitioner's losses was fittingly presented to the jury, inasmuch as more than 2,300 transactions (R. 53) were involved, of a highly technical character, presenting a case where the opinion of expert banking accountants was imperative to any clear understanding of issues. In its charge the trial court (R. 439) *limited* the effect of such testimony by the very instruction

(quoted in full, supra), for which the Circuit Court was reversed.

The Circuit Court of Appeals considered only a fragment, above quoted, of the trial court's charge to the jury. But, in addition thereto, the jury was instructed (R. 437) that they were not concerned with losses in the old bank, only with the direct losses sustained by plaintiff bank as the result of dishonest acts of its employees as alleged; that the main and controlling issues (R. 438) for determination were whether, as to each of the ten items, to be passed upon separately, it was shown by a preponderance of the evidence that plaintiff sustained a direct loss as a result of the acts as alleged in each one of the items; that if it was not shown by a preponderance of the evidence (R. 438) in respect to the ten items that a direct loss was sustained by plaintiff as a result of the dishonest acts of the employees named, and as alleged, a plaintiff's verdict would not be warranted; that defendant could not be held liable for any loss of the old bank and could be held only for loss, as alleged, in the ten items in the petition, of monies and securities of plaintiff bank, which losses occurred within the coverage period of time the bond was in effect; and that it was conceded by stipulation that the bond was in effect during the entire period of time these transactions took place (R. 438); that the burden was upon the plaintiff to prove by a preponderance that a direct loss was sustained by the bank of monies, securities and properties of the bank within the terms of the

bond (R. 440); that if the jury should find from a preponderance of the evidence that Lastovica did, on or about the date as charged in Item No. 1, while the bond was in force and effect, during the period of time this bond was in force and effect, while an employee of plaintiff, commit the acts as alleged, that said acts were dishonest, done by him while in plaintiff's employ, and thereby was the proximate cause of the loss of monies and securities, as defined in the bond, then a verdict in favor of plaintiff on Item No. 1 should be returned in the amount as might be found (R. 440); that the same charge (R. 441) applied to the determination of the issues relating to each one of the ten items, as to each of which the jury was required to make a special finding; and the jury (R. 441) was conversely instructed as to each of the items, the trial court again instructing that it was plaintiff's burden to establish by a preponderance of the evidence that acts as alleged were committed by its employees while the bond was in force and effect, and they were advised that if no direct loss was sustained, as provided in the bond, or if no direct loss occurred, although the acts were dishonest, defendant was entitled to a verdict; and (R. 441) that they were the exclusive judges of the credibility of the witnesses, all of the witnesses, and of the weight to be given their testimony and the facts proven in the case.

Specification of Errors to Be urged

The Circuit Court of Appeals erred:

(1) In holding that the experts should have

been restricted to giving testimony as to what was actually done in each instance as revealed by the records and to explaining any technical matter involved in banking or accounting, and that there was error in permitting them to testify that the assets of the bank were reduced by the amount of the withheld deposit slips, since the jury could have reasonably understood and probably did, that if they believed such statements, then they might render judgment based thereon.

(2) In holding that the testimony of the experts that the assets of the bank were reduced by the amount of the withheld deposit slips was not true, if the money actually went into the bank to cover previous shortages or withdrawals, and the bank did not suffer diminution of assets.

(3) In considering only an isolated portion of the trial court's charge that the testimony of the experts was admissible "as relating to a matter that the jurors will themselves have to arrive at and determine, and in arriving at such determination you will take into consideration the testimony of all witnesses, including the testimony of all witnesses to whose testimony you will give credence, including those who were allowed to testify as experts, as to whether or not a direct loss was sustained by the bank at the time and within the period alleged herein of the ten items, and while the bond was in effect. This matter is an issue for your ultimate determination, based upon all of the testimony offered on trial of the cause." And in holding that the giving of such

fragmentary part of the whole charge constituted reversible error; and in failing to hold that the trial court's charge, when considered as a whole, fairly and fully submitted the issues in the case.

(4) In deciding that a fair interpretation of the language of the bond required the insured, as a predicate to liability, to establish an actual present loss.

(5) In failing to hold that the clear preponderance of the evidence, without aid of the expert testimony, established the bank's ten items of loss, within the meaning of the bond, and in failing to affirm the judgment for that reason.

(6) In failing to hold that the Lastovica cage loss (Item 1) was not covered up by withheld deposit slips, and was established by the clear preponderance of the evidence; and in failing to affirm that part of the judgment based upon the jury's special issue finding as to Item 1, and adjudging the costs of the suit to follow that recovery.

(7) In overruling its first decision, although the evidence at the second trial was the same, without deciding that the first decision was manifestly wrong.

(8) In holding that petitioner's assets were not reduced by the amount of the withheld deposit tickets, only if they, at that time, had actually withheld or withdrawn the money represented by the

tickets, and if on the other hand, they had placed it with the cash and given some other depositor credit therefor, in order to cover up money previously withheld or withdrawn and charged to the latter's account, the bank's assets would neither have been increased or diminished, because, while it would have reduced its liability to the one whose funds had previously been taken, by the same act, it would have become liable to the new depositor for the amount represented by this deposit slip or entry in his bank book.

(9) In holding that "However, such new deposits only served to cover up the previous withdrawals and the liability of the bank remained the same, being simply switched from the old to the new depositors."

For brevity, petitioner here assigns as additional errors committed by the Circuit Court of Appeals those contained in its Petition for Certiorari set out under "Questions Presented," and "Reasons Relied Upon for Allowance of the Writ," and in its Petition for Rehearing filed in the Circuit Court, all of which petitioner now refers to and by adoption includes herein and prays that the same may be considered.

ARGUMENT

Summary of Argument

(1) We first show that the testimony of the experts was admissible, because of the complexity of

the issues; that such testimony was properly received as opinion evidence upon an undenied predicate; and that the overwhelming preponderance of the evidence showed there was a dishonest abstraction of the bank's assets, within the currency of the bond, that is, after the bank's opening and between that date and the discovery of the losses, during which period the bond was in full force.

(2) Then we show that the Court's charge upon the experts' testimony was proper, that the Circuit Court considered only a fragmentary part of the whole charge; that the portion considered was a correct limitation upon the value of the experts' testimony, and that the court's charge, as a whole, properly submitted all issues.

(3) Next, we show that the law is against the holding of the Circuit Court that by the terms of the bond, petitioner was required to establish an actual present loss, and that liability was fixed when it was established that on and after the bank's opening and during the life of the bond, its employees dishonestly took its assets, and insured was not required to show the exact time and manner of such taking. We call attention to the fact, that under the Texas rule of decision, if any shortages were brought over from the old bank into the new bank, after its opening date, and while bond was in force, the bonding company was liable therefor.

(4) We demonstrate here that the clear preponderance of the evidence, without reference to the

testimony of the experts, supports the jury's verdict. We note that the Lastovica cage loss had no connection with any suppressed deposit ticket. We show that the Circuit Court destroyed its first judgment, although the evidence at the second trial was practically identical, although such result was not based upon any holding that the first opinion was manifestly wrong or erroneous in any part. We show that without regard to the testimony of any expert the overwhelming preponderance of the evidence, undisputed in its substantial aspects, showed that there was a contemporaneous taking of petitioner's assets at the times of the suppression of the deposit slips, although this burden was not petitioner's; and we show that under any view of the evidence, petitioner's losses arose during the life of the bond.

(5) Finally, we show that the decision of the Circuit Court of Appeals that the jury could have reasonably understood and probably did, that if they believed the testimony of the experts, then they might render judgment based thereon, while, on the other hand, if the money actually went into the bank to cover previous shortages, the statements were not true, is in itself most speculative, without foundation in the evidence, and an invasion of the province of the jury..

I.

The Testimony of the Experts Was Properly Admitted

The testimony of the experts was not only prop-

erly admitted, but it was factually true, since with respect to all of the items, except the ninth—Bassel Wilson item, Lastovica (R. 165, 177), Davis (R. 226), and Surghnor (R. 208, 214, 258, 276) confessed and admitted the taking of petitioner's money after its opening date on September 23, 1933, and prior to April 15, 1935, while the bond was in full force (R. 77). The ninth item, Bassel Wilson, was established by the unauthorized charge ticket (R. 224), and the customer's positive testimony (R. 234, 5). All this evidence, which was not even seriously disputed, was before the jury, and before the auditors as a predicate to their testimony with which the Circuit Court finds fault.

The Circuit Court is confused with respect to the period of coverage of the bond; and it is confused in its holding that liability would not exist unless there was present contemporaneous taking of money at the time of the suppression of the deposit tickets. It says that the testimony of the experts could not have been true if at the time of the suppression of the slips the funds went into the bank to cover previous shortages. Granted, as a pure academic proposition. But that is not the case here. For the bond protected from September 22, 1933, beyond April 15, 1935, and all losses were admittedly sustained in that period (R. 77). Hence, it becomes immaterial that petitioner's losses were not established as to the exact moment of taking, provided, as was done, petitioner showed that its losses were sustained during the bond period, either by carry-over from the old bank, or by other peculation, within the bond's

life. Overlooking this, the very crux of the case, has led the Circuit Court into error. We have shown that the expert's testimony was not incorrect, but borne out by the documentary evidence and the admissions of the defaulters. Moreover, at the time petitioner opened for business it owed none of the accounts from which its employees abstracted its funds. Yet as a result of their conduct, it was undisputed, that during the life of the bond between the date of its issuance and prior to April 15, 1935, there were shortages in these customers' accounts, which petitioner, out of its own funds, reimbursed in the amount of the jury's verdict, to the penny. Thus, it is seen that the jury could not have been misled by the experts' testimony; and it is manifest that it was established without regard to the experts' testimony that the bank sutsained the ten items of loss within the period between its opening on September 23, 1933, and April 15, 1935.

That the case presented complex accounting and auditing questions cannot be questioned, nor can it be doubted that the experts possessed the highest qualifications. They worked for months pursuant to the appointment by the trial court (R. 311). They had before them all the necessary books and records (R. 221-236), and they had the testimony of witnesses, including the testimony of the three employees in their criminal trials, at which they were convicted of making false entries (R. 331). Incontestably they studied and traced out the ten items of loss (R. 330), and were able to identify all of them (R.

332). They were all in accord, including the bonding company's only witness, Templeton, who was not a certified public accountant, that any losses in the old bank that were brought forward into petitioner's bank were carried over subsequent to the date of petitioner's opening, and before April 15, 1935 (R. 414-417), during which time it was stipulated that the bond was in force (R. 77). That the case was complicated is further revealed by the fact that the Circuit Court has rendered two entirely different and conflicting opinions on the same evidence. This is further reflected in the appointment of special auditor Upleger, which was not contested or acquiesced in by the bonding company, but it requested he make certain findings (R. 57, 8, 9). If there ever was a case that required the use of expert banking and technical knowledge to clarify and present the issues to the jury, we find it here presented. It is significant that at neither trial did the bonding company present experts who controverted the position of the experts testifying for petitioner.

Thus far we have shown that the testimony of experts was in fact correct. Assuming that it touched upon an ultimate jury issue, for argument's sake, the Circuit Court still has erroneously reversed the case and announced a rule of decision opposed to the accepted doctrine prevailing, without exception so far as known to us, in all federal courts, the typical expression of which is contained in *New York Life Ins. Co. vs. Doerksen*, 64 F. (2d) 240, where, in a suit on a life insurance policy, upon the question of the right of an expert to give his opinion as to the

cause of death, the Tenth Circuit Court of Appeals held:

> "Where the matter under inquiry is one of which certain persons by reason of training, observation, or experience possess expert knowledge which will be of aid to the jury in reaching a correct solution of the issues and is therefore properly the subject of expert testimony, it is no objection that the opinion elicited from the expert is on an issue or point to be decided by the jury. *United States Smelting Co. vs. Parry* (CCA 8th) 166 F. 407; *Chicago R.I.&P. Ry. Co. vs. Hale* (CCA 8th) 176 F. 71; *Western Coal & Mining Co. vs. Berberich* (CCA 8th) 94 F. 329; *Eastern Transportation Line vs. Hope*, 95 U.S. 297, 24 L. Ed. 477."

The very identical question was passed on by the Circuit Court of Appeals on the first appeal (*Continental Casualty Company vs. First National Bank of Temple*, supra), where it said:

> "Arthur C. Upleger, an expert certified public accountant of long standing, an auditor possessing much experience in checking and making bank audits, was appointed by the court to make an examination of the accounts and condition of the affairs of this bank. He spent several months in and about this work; and being empowered by the court, called before him many witnesses who were sworn and testified. The confessions and admissions of the three bank employees and who had been convicted of 'making false entries' were before Upleger, and is a part of the evidence. Thereupon, he made to the Court a detailed report of his findings, which is

in the record. He also testified *as was his right, as an expert*, and his testimony is also a part of the evidence in the case."

The point was adversely decided to the holding of the Circuit Court of Appeals by this Court in *Transportation Line vs. Hope*, 95 U.S. 297, where it was said:

> "The witness was an expert, and was called and testified as such. His knowledge and experience fairly entitled him to that position. It is permitted to ask questions of a witness of this class which cannot be put to ordinary witnesses. *It is not an objection, as is assumed, that he was asked a question involving the point to be decided by the jury.* As an expert he could properly aid the jury by such evidence, although it would not be competent to be given by an ordinary witness. It is upon subjects on which the jury are not well able to judge for themselves as is the witness that an expert as such is expected to testify. Evidence of this character is often given upon subjects requiring medical knowledge and science but it is by no means limited to that class of cases. It is competent upon the question of the value of land, *Clark v. Baird*, 9 N.Y. 183; *Bearss vs. Copely*, 10 id. 93; or as to the value of a particular breed of horses, *Harris vs. Panama Railroad Co.*, 36 N.Y. Superior Ct. 373; or upon the value of the professional services of a lawyer, *Jackson v. New York Central Railroad Co.*, 2 Thomp. & C. (N.Y.) 653; or on the question of negligence in moving a vessel, *Moore v. Westervelt*, 9 Bosw. (N.Y.) 558; or on the necessity of jettison, *Price v. Hartshorn*, 44 N.Y. 94. In *Walsh vs. Washington Marine In-*

surance Co., 32 id 427, it was decided that the testimony of experienced navigators on questions involving nautical skill was admissible. The witness in that case was asked to what cause the loss of the vessel was attributable, which was the point to be decided by the jury. The court sustained the admission of the evidence, using this language: 'We entertain no doubt that those who are accustomed to the responsibility of command, and whose lives are spent on the ocean, are qualified as experts to prove the practical effect of cross-seas and heavy swells, shifting winds and sudden squalls.' The books give a great variety of cases in which evidence of this character is admissible, and we have no doubt of the competency of the evidence to which this objection is made."

II.

The Trial Court's Instruction Upon the Testimony of the Experts Was Proper, as a Restriction Thereon; and the Charge as a Whole Properly Submitted the Case

As the second ground for reversal, the Circuit Court found error in a part of the trial court's charge. The Court failed to quote the last sentence of the portion criticized, which had the effect to meet the Court's objection and fairly to submit the case. The part omitted was, "This matter is an issue for your ultimate determination, based upon all of the testimony offered on trial of the cause."

It is petitioner's view that the language of the charge delimited both the effect and the

value of the experts' testimony, and was more favorable to the bonding company than it merited under the law because the Court said (R. 439) that the expert testimony related to a matter that the jurors themselves had to determine, and that in such determination they should conside the testimony of all witnesses to which they gave credence, including the experts, as to whether direct loss was sustained within the effective period of the bond. Furthermore, the Circuit Court omitted to consider the whole of the Court's charge, and the other portions of it where, beyond any vestige of doubt, the burden was properly instructed upon. We call attention to the fact that the court told the jury (R. 437) that it was concerned only with monies of petitioner, not with regard to monies of the predecessor bank, that bonding company was not liable under its bond for losses occurring in connection with the operation of the prior bank, but covered only direct losses sustained by petitioner, as a result of dishonest acts of its employees, *as alleged;* that the main and and controlling matter (R. 438) or issues for the jury's determination were whether as to each of the ten items, to be passed upon separately, it was shown by a preponderance of the evidence that the bank sustained a direct loss as a result of the acts as alleged and set forth in each one of the respective items in the plaintiff's petition, that unless it was shown by preponderance of the evidence in the matter of the ten items that a direct loss was sustained by the bank as a result of such dishonest acts, a plaintiff's verdict was not warranted, and that the bonding

company could not be held for any loss in the old bank, could only be held for losses alleged to have been sustained in the ten items of money of the petitioner, and that the losses occurred within the coverage period of time this bond was in effect, *it being conceded by stipulation that the bond was in effect during the entire period of time these transactions took place* (R. 438). And immediately prior to the criticized portion of the charge, the trial court (R. 439), fully instructed the jury as to the meaning of dishonest acts, and thereafter advised the jury (R. 440) that the burden was upon the bank to prove by preponderance of the evidence that direct loss was sustained by it in monies within the terms of the contract sued on; and (R. 440) that the jury if it found from a preponderance of the competent evidence, as believed and as defined, that Lastovica did on or about the date as charged in Item one, *while this bond was in force and effect, during the period of the time this bond was in force and effect,* while petitioner's employee, committed the acts alleged in the petition, and that the same were dishonestly done by him while in such employ, and thereby was a proximate cause of loss of monies, as in the bond defined, then they should render a verdict in favor of plaintiff as to item one in the amount as might be found. Then the court (R. 441) advised the jury that they should determine their answers to the special issues as to each of the ten items in the same manner; and next the court submitted item one conversely, with the same character of instruction in respect to all of the other items, charging the jury that if it did

not find from a preponderance of the evidence that the acts as alleged in item one were committed by Lastovica, as alleged, and while the bond was in force and effect, or if they occurred, but direct loss was not occasioned, although acts were dishonest, yet if no direct loss was sustained, as in the bond provided, they should find against the bank (R. 441).

The court fully instructed upon the meaning and preponderance of the evidence (R. 440), and advised the jury that they were the exclusive judges of the credibility of the witnesses, of all the witnesses, and the weight to be given their testimony and the facts proven in the case (R. 441). These repeated admonitions fully preserved bonding company's rights, if they did not unduly stress plaintiff's burden to establish direct losses within the effective period of the bond. Naught is said in the charge, or in any part, that the experts' testimony was to be controlling. Contrarily, the trial court was careful to limit its effect in the minds of the jury, and to whittle down its significance.

Also, there can be little doubt that the Circuit Court was wrong in considering only a portion of the charge and basing its reversal thereon, for, as said in the typical case of *S. S. Kresge Company vs. McCallion*, 8th Cir., 58 F. (2d) 931, at page 934:

> "It is not difficult to destroy almost any charge by isolating certain limited expressions therein, but the charge must be considered as a whole with the view of determining impression

conveyed thereby to the jury." Id., *American Glycerin Co. vs. Eason Oil Co.*, 98 F. (2d) 479; *Danzansky vs. Zimbolist*, 105 F. (2d) 457, etc., etc.

Id., *Metropolitan Life Insurance Company vs. Armstrong*, 8th Cir., 85 F. (2d) 187; *McCarthy vs. Palmer, et al*, 2nd Cir., 113 F. (2d) 721; *Northern Pacific R. Co. vs. Babcock*, 14 S. Ct. 978; *Seaboard Airline R. Co. vs. Clara V. Padgett*, 236 U.S. 668, 35 S. Ct. 481.

The doctrine has clearly been stated by this Court in *Seaboard Airline Railroad vs. Clara V. Padgett*, supra, where it is said:

> "But while the proposition has sufficient strength to exclude the conception that the contention is frivolous, we are nevertheless of opinion that the court below was right in holding that even upon the concession, for argument's sake, that the two charged referred to, if they had stood alone, might have tended to give to the jury a mistaken conception of the law of assumption of the risk, nevertheless there was no reason for saying that they could have produced such a result in view of the express instruction concerning the doctrine of assumption of the risk as applied to the case in hand which was given by the court to the jury in the very words asked by the company, and which was so explicit as to dispel the possibility of misconception. Whether the instructions could have produced misconceptions in the minds of the jury is not to be ascertained by merely considering isolated statements, but by taking into

view all the instructions given and the tendencies of the proof in the case to which they could possibly be applied."

On the two following pages, for the convenience in comparison, we have sectionalized the criticized portion of the trial court's charge, and a trial court's instruction approved by this Court. A cursory reading discloses the most startling likeness.

The Circuit Court held that the trial court committed reversible error in instructing the jury that "On the trial of this cause, gentlemen of the jury, there was testimony given by witnesses, and admitted by the Court as testimony by experts in the handling of banking affairs and knowledge of bookkeeping, in which said witnesses were permitted to testify, and did testify, as to when losses occurred with reference to each of the respective ten items made the basis of plaintiff's action herein. That testimony was admissible as testimony of experts as relating to a matter that the jurors will themselves have to arrive at and determine," and in arriving at such determination, you will take into consideration the testimony of all witnesses, including the testimony of all witnesses to whose testimony you will give credence, including those who were allowed to testify as experts, as to whether or not a direct loss was sustained by the bank at the time and within the period alleged herein of the ten items, and while the bond was in effect. This matter is an issue for your ultimate determination, based upon all of the testimony offered on trial of the cause." (R. 439).

Forsyth vs. Doolittle, 120 U.S. 73, 7 S. Ct. 408, was a suit for the value of legal services, as to which various experts had testified. This Court there approved a trial court's charge that:

"You are not bound by the estimate which these witnesses have put upon these services. They are proper to be considered by you as part of the proof bearing upon the question of value, as the testimony of men experienced in such matters, and whose judgment may aid yours. But it is your duty, after all, to settle and determine this question of value from all the testimony in the case, and to award to the plaintiff's such amount, by your verdict, as the proof satisfies you is a reasonable compensation for the services which, from the proof, you find plaintiffs rendered after deducting the amount the plaintiffs have already received for such services."

In *The Conqueror*, 17 S. Ct. 510, this Court cited with approval the decision in the Forsyth case. The reasoning of this Court in these cases finds full application here. Not only is the opinion of the Circuit Court against the logic of the rule here stated; but, if permitted to stand, the full and helpful value of expert testimony will be denied to juries.

III.

Bank Was Not Required to Prove an Actual Present Loss, Nor to Show the Exact Time and Manner of the Abstractions Provided it Showed Losses Occurred Within Life of Bond

The bond protected the insured "against the direct loss * * of money or securities, sustained while this bond is in force * * *. Through any dishonest act wherever committed, by any of the employees, as defined * *." (R. 134). It was the usual banker's blanket contract of fidelity indemnity insurance. The Circuit Court interpreted these provisions to require bank to establish an actual present loss before liability was fixed. This view is directly contrary to the cases hereinafter cited. And if this is so, recovery upon bonds of this character would be precarious indeed, because of the very nature of the risks covered; and the purpose for which such bonds are bought and paid for would be defeated, since, necessarily, defaulting employees operate secretly. The holding of the Circuit Court in this respect is without sound foundation in law or justice, is contrary to the accepted rule of construction, and has no confirmation in authority. On the first appeal, the Circuit Court quoted with approval from the leading case upon the subject of *Peoples Bank of Sanford, N. C., vs. Fidelity & Deposit Company of Maryland*, 4th Cir., 72 F. (2d) 932, 939, where that Court announced:

> "Embezzlers ordinarily operate secretly, and a surety may not escape liability under a

bond such as this because the employer is unable to show the exact time and manner of the embezzlement."

The Fourth Circuit Court, in its treatment of the proposition, considers and cites exhaustive authority. On the first appeal the Circuit Court followed the correct doctrine of law when it said, "The appellant did not show the exact time when the losses occurred. This was not necessary."

It will be borne in mind, and our constant repetition will be pardoned, that the parties stipulated (R. 77) that the bond was effective from the opening day of the bank until past the time of the discovery of losses in April, 1935.

The Circuit Court devotes time to the speculative consideration of the question that the suppressed tickets might have served to cover up a previous withdrawal, without the bond period. In answer, we state that that matter is wholly immaterial, since all the evidence, including that of the bonding company's witness Templeton (R. 415, 17) showed, without dispute, that whatever shortages were brought into petitioner's bank came into its affairs after its opening and while the bond was in effect. Upon this subject, on the first appeal, the Circuit Court stated and followed the rule declared in the leading Texas case, *Royal Indemnity Company, et al, vs. North Texas National Bank, et al,* Tex. Comm. of App., 34 S.W. (2d) 249, and held:

> "Unquestionably, the bonding company can not be held for any loss not sustained within the effective period of its bond. But where there were shortages in the predecessor bank and the employees there took money, and afterwards came into the new bank as employees and covred their defalcations in the old bank by taking the money of the new bank, the bonding company would be liable." Cases cited at page 310.

The bond in suit being a continuing banker's blanket fidelity bond, a contract of insurance, subject to rules of construction applicable to insurance agreements, should be construed and enforced most favorably to the insured, *Fidelity & Deposit Company of Maryland v. Bates*, 76 F. (2d) 160; *Griffin v. Zuber*, 113 S.W. 961; *American Surety Co. of New York v. Pauly*, 18 S. Ct. 552; and should be determined in accordance with the decisions of the highest courts of Texas, *Erie R. Co. v. Tompkins*, 58 S. Ct. Rep. 822.

Petitioner's books were in balance from date of opening through date of discovery of losses (R. 306); it had all its assets on opening date to which it was entitled (R. 306). If there was any carry-over, whatever the amount, into the new bank, which view was opposed by Upleger (R. 339), Roberts (R. 315), Hooper (R. 239), and by the admissions of the employees, then under the decisions of the highest courts of Texas, as hereafter shown, the bonding company was liable for the amount of the carry-over. If there was any carry-over into the new bank, its funds were taken by the dishonest acts of

its employees during the period when it was protected by the bond (R. 77). The conduct of bank's employees, who went into its employ on the opening date, in giving unauthorized credit in petitioner's bank to cover their shortages in the old bank, caused petitioner a loss within the meaning of the bond, under the Texas decisions, *Royal Indemnity Company, et al, vs. North Texas National Bank, et al*, 34 S.W. (2d) 249; *Western Indemnity Company vs. Free & Accepted Masons of Texas*, 198 S.W. 1092.

Bonding company's single witness, Templeton, agreed that whatever the amount of the carry-over, it was brought into petitioner's bank after opening date and before April 15, 1935 (R. 415, 417). The Circuit Court (R. 461) cites in support of its conclusion, *North Texas National Bank v. Royal Indemnity Company*, 25 S.W. (2d) 822. This decision was vacated on rehearing by the Texas Commission of Appeals in its opinion reported in *Royal Indemnity Company, et al, v. North Texas National Bank, et al*, 34 S.W. (2d) 249. The fact situation there presented so closely parallels the facts in our case that if the names of the defaulting employees were substituted, no other change might be necessary, if it is assumed that there is a carry-over. Because of this unusual similarity of facts we quote from that opinion:

> "The record conclusively shows that Spangler never increased the amount of his embezzlement after May 14, 1925, the date on which the Southwest National Bank ceased to do business.

Had Spangler's shortage been discovered on that date, the Southwest National Bank would have been the loser of that amount, and the North Texas National Bank, its successor, would never have been involved in this controversy at all. The officers of these two banks being ignorant of these defalcations, consummated a contract by which, among other things the North Texas National Bank took over the assets of the Southwest National Bank, and assumed its liabilities, except to its stockholders. When the Southwest National Bank closed its doors on May 14, 1925, it was indebted to several of its depositors in the total sum of $38,571.28, being the amount Spangler had received from such depositors without giving them credit upon the books of the Southwest National Bank. In other words, by reason of Spangler's embezzlement, the Southwest National Bank owed to its depositors $38,571.28 more than its books reflected. When the North Texas National Bank took over the Southwest National Bank, Spangler at once became an employee of the North Texas National Bank. He then proceeded to take money he received from depositors of that bank and cover his defalcations to the Southwest National Bank. He, by his dishonest acts, thus caused loss to the North Texas National Bank in the sum of $38,571.28. The North Texas National Bank was protected by the bond of the American Surety Company of New York at the time this was done. It follows that the North Texas National Bank is entitled, as a matter of law, to recover this amount from the American Surety Company of New York, with 6 per cent interest from May 16, 1925."

Western Indemnity Company vs. Free and Accepted Masons of Texas, 198 S.W. 1092, involved a suit on fidelity bond covering one Bluitt. The Court declared (p. 1100):

> "Even if Bluitt had been short in his accounts prior to the life of this bond, and had borrowed money from banks or individuals to cover this shortage, and after the execution of the bond had used the Grand Lodge funds with which to repay these losses, there being some evidence to this effect, the use or taking of the Grand Lodge funds to pay these losses would be a fresh and independent act of embezzlement or defalcation, occurring during the life of the bond, and for which the bonding company would be liable." Id. *Hetten vs. Lane*, 43 Texas 279.

The Circuit Court cited in support of its conclusion (R. 461) its own decision in *Aetna Casualty & Surety Company vs. First Trust and Savings Bank*, 62 F. (2d) 316. We have examined the original record of that case, and find that the misappropriation there was effected, in the main, by the same device here employed. The same trial court there, upon the testimony, principally, of the same auditor, Upleger, there as here, functioning as the auditor in the case, deemed his opinion sound, and directed a verdict for plaintiff, and judgment thereon was affirmed by this Circuit Court. We invite attention to the holding of the Circuit Court in that case:

> "It is argued that thus after July 6, 1929, Anderson had repaid all that he had taken pre-

viously and was short only the money last taken in, for which deposit slips were being withheld at the time of discovery. The reasoning is wholly fallacious. The money taken on general deposit became at once the money of the bank, all of it. Whenever Anderson took out any actual money a loss occurred to the bank. By putting new deposits into the bank's cash he paid nothing back, but only put the bank's own money where it belonged. *Royal Indemnity Company v. Bank* (Tex. Com. App.) 25 S.W. (2d) 822. *The sums recovered were all taken in the year covered by the bond.*"

IV.

Without Aid of the Experts' Testimony, Plaintiff's Case Was Made Out by the Overwhelming Preponderance of the Evidence

On this, the Circuit Court, at the first appeal, said:

> "Here, we have a case where the employees of the new bank, three of them, disclosed their shortage and defalcations while they worked for the new bank. This went on until it could no longer be hidden. It was the old story of plunder and pillage that finally came to light. The preponderance of the evidence points to the guilt of the employees of the new bank.. We are constrained to hold, after a careful consideration of all the evidence, that the trial court gave to the jury a directed verdict which was not supported by any substantial evidence. *Massachusetts Bonding & Ins. Co. vs. Hudspeth*, 8th Cir., 94 F. (2d) 467.

On the second appeal, the Circuit Court said that the case was before the jury by consent, upon the evidence adduced before the special auditor, "*plus mainly the testimony of expert accountants, including the one who had acted as the examiner.*" This holding we must respectfully controvert. It was and is petitioner's position at all times that regardless of the testimony of any expert the clear preponderance of, if not the undisputed evidence established liability in the case; and that the introduction of the testimony of the experts, if not admissible, was harmless and prejudiced no substantial right of the bonding company, inasmuch as no other result could have obtained than a plaintiff's verdict. In support of this position, we desire to call attention to the non-expert evidence. The ten items of loss and the supporting non-expert evidence will be considered seriatim.

The Lastovica Losses (1st Item, $1,707.00 Cage Shortage; 2nd Item, Navratil Check; 3rd Item, Motl Deposit

$1,707.00 Cage Shortage

(1st Item)

In the course of regular national bank examination, examiner Glass unearthed the losses (R. 158-160). Lastovica's cash book in his own handwriting was in evidence (R. 160), together with entry showing cash item of $3,531.13 (R. 161). Witness Glass testified that the figure meant cash in the cage, that he did not find that amount in Lastovica's posses-

sion, but the cage was short $1,707.00 (R. 162). That Lastovica admitted then to him a shortage in that amount and signed a written confession admitting same (R. 163). Witness Hooper corroborated (R. 223). Glass, at the criminal trial of Lastovica, identified bank's general ledger (R. 165), and entry therein showing that his cash was credited with the amount of shortage out of bank's money. Thereafter, Lastovica signed a second written confession (R. 178), in which he stated that *after the organization of the bank in September*, 1933, he became short in his accounts with the bank in the amount of $2,320.00, which he covered up by "plugging;" and that on April 5, 1935, he withheld the Navratil deposit of $613.44 to cover additional shortage, and that the same night the examiner discovered a shortage in his cage of an additional $1,707.00. At the trial, plaintiff reduced its claim on this cage shortage to $1,345.00 by reason of certain checks subsequently found in bank and conceded to be collectible (R. 219, 251).

Navratil and Motl Items
(2nd and 3rd Items)

There were in evidence customer Navratil's individual ledger sheet, his deposit slip of $613.44, described in Lastovica's second confession (R. 178), and the transit record for April, 1935 (R. 171, 172). Witness Glass testified that Lastovica did not disclose this item, and that he was present when auditor Hooper found the ticket between the pages of a magazine in Lastovica's cage, and at the same time,

he found the Motl deposit ticket for $20.00 in the same place. Witness Hooper corroborated and testified he traced out the Navratil item and found that customer's account had not been credited with the deposit (R. 223). Navratil's deposit ticket was dated April 5, 1935; ledger sheet showed credit on April 8th (R. 172, 214); Motl ticket was dated April 5th, and his ledger account showed credit on April 8th, both dates after tickets were found. And it was stipulated that these items did not go to credit of customers until same was given by bank out of its own funds (R. 174, 175, 214). Entry of Navratil deposit in transit book introduced as of April 5th showed offsets to deposit (R. 176), and pass book and duplicate deposit slip were introduced (R. 179). Glass testified that on April 8th, he charged Lastovica shortage account, out of the bank's funds, $613.44 to reimburse Navratil for which bank had never been repaid (R. 179).

Witness Motl testified he made the deposit (R. 181). His deposit slip, individual ledger sheet, pass book and duplicate deposit slip were introduced in evidence (R. 200). Witness Glass testified that Motl was paid by bank (R. 175), and that Navratil and Motl items were in addition to the $1,707.00 item (R. 183).

Witness Glass testified that from date of bank's opening on September 23, 1933, until shortages had been developed in April, 1935, all test checks disclosed the bank's books regularly in balance (R. 256) and that bank's books did not reveal any of the short-

ages (R. 246, 247). That he traced out the Navratil deposit and that the supporting check went out of the bank the date Lastovica took the deposit, but that he never gave the deposit slip to the bookkeeper (R. 252); and that customer never got proceeds of his check until paid by bank. Bank reimbursed customers Navratil and Motl out of its own funds in the amounts of their respective deposits (R. 192).

The A. E. Warren Tax Collector Auto Account (4th Item)

The duplicate deposit slip dated March 26, 1935, to the account of A. E. Warren, Tax Collector Auto Account, in the amount of $3,047.16 (R. 183), advice card from People's National Bank, Belton, Texas, of same date, showing credit of plaintiff's account in the same amount (R. 185), deposit slip in plaintiff's bank dated March 27, 1935, to A. E. Warren account, in the same amount (R. 186), were all in evidence. It was stipulated that plaintiff's exhibit 8 showed that customer's ledger sheet, reflecting account of A. E. Warren for period of January 13, 1935, to April 1, 1935, inclusive, did not show an item of $3,047.16, as having passed to credit of account until April 1, 1935, when account was credited by bank out of its own funds (R. 187).

Witness Glass testified that entry was made in the handwriting of Surghnor (R. 187); that appellee's Exhibit 8 indicates the credit for $3,047.16 made on April 1st, and represents a reimbursing credit made at witness' direction; that this amount

is offset under date of March 27th by the previous charge against the account of People's National Bank, Belton, Texas, in appellee's bank (R. 187), which was supported by the advice card dated March 26th, 1935; and that that charge ($3,047.16) was made against the Belton bank in the general ledger of appellee's bank (R. 188, 192).

Witness testified (appellee's Exhibit 9, R. 190) check for $2,536.59 drawn on Austin bank, payable to cash, dated Austin, Texas, 3-28-35, signed by J. R. Williams, and commission company check for $511.01, payable to Perkins and Surghnor, were in assets of the bank on night of April 1st; that they were run out of Davis' cage; that Davis confessed that when credit was made on March 27th, and should have been placed in Warren's account at that time, he withheld credit at Surghnor's direction; that on Sunday he (Davis) had been after Surghnor to give him the offsets to this credit, and Surghnor gave him this $511.01 check and the Williams check for $2,536.59, and he put the entry through on April 1st, credit having been withheld from March 27th (R. 190). Witness testified that the Fort Worth $511.01 check was paid (R. 190); and the charge-back slip on the Williams-Austin check for $2,536.59 (appellee's exhibit 10) was in evidence (R. 191). Witness further testified that the sum of $3,047.16 was charged in appellee's bank to an account designated "Shortage of Surghnor" under date of April 2nd on the general ledger, and the $510.57 was credited to that account, which reduced it in that amount

(R. 191). He further testified that a special account was set up out of which appellee's customer claims were paid; that no part of the A. E. Warren account shortage, except the Fort Worth check, had been repaid to the bank (R. 192). The debit slip supporting the charge to the loss account of A. E. Warren $3,047.16 item (appellee's exhibit 12) was in evidence.

The witness, Sam Davis, testified (R. 225) that he was an employee of the old bank, as bookkeeper; Surghnor and Lastovica were assistant cashiers of that institution. That appellee *opened for business on September* 23, 1933. That when appellee opened he was employed as assistant-cashier, and Surghnor was made cashier. He testified, with reference to A. E. Warren, etc., account, deposit of $3,047.16 that *about twelve months after appellee opened,* Surghnor was in the cattle business with one Perkins, Surghnor signing practically all checks (R. 225); that it was not long before they had become overdrawn and Surghnor asked witness to keep checks in his window, and to take care of them, which he did; that it just started as a small amount, approximately $200.00 or $300.00, and it finally built up to where it was $3,047.16, *where it took that deposit from Mr. Warren to offset the checks that Surghnor had in the cash file* that he had signed as head of the meat company (R. 226).

Witness further testified that under the direction of Surghnor, his superior, he continued to hold his checks until it reached the approximate amount

of $3,047.00; that about March 27th Surghnor asked him to give him all the checks and that he would give witness a check or would give him money, or get a good check to take care of them. *Whereupon, witness turned checks over to Surghnor,* and Surghnor said that he would give him the money or a check that afternoon; that Surghnor did not do as he promised and witness got hold of him and Surghnor said, "Now, you hold out a deposit some way to cover this until I can get some money to you," and witness complied (R. 226). Witness testified that on March 28th, he got after Surghnor again and latter replied, "I will try to get it today; I will do my best," but that he didn't do it, and witness still held the deposit; that Friday he gave witness a check for $500.00 on the commission company in Fort Worth and promised that on the next day he would have all of it; that on Sunday, witness went to Surghnor's home and latter gave him a check for $2,500.00 and some odd dollars, and directed him to deposit it with the Fort Worth check, and that they would be all right, and that witness could put Mr. Warren's deposit ticket on the books. Witness said that on Monday morning he did as directed, but late Monday night the validity of the Austin check was questioned by the auditors. Whereupon, witness went to Surghnor's home and he told him that the check was perfectly good, that there wasn't anything wrong with it, and "you haven't anything to worry about" (R. 227). Witness testified that Surghnor said the check was signed by his brother-in-law, Williams, who had given it to him (R. 228). Witness testified

that he kept the Warren item in his cash from Wednesday, March 27th, until Monday, April 1st (R. 229).

Witness Davis testified that Surghnor gave him a *forged check* (Williams' $2,536.59 Austin check, R. 230), but that the other check (Fort Worth $511.01 check) was good (R. 228).

The witness continued:

> "I knew this was wrong, and that it was taking the bank's money. I didn't tell anybody, and I didn't want anybody to know, and I would have lost my job. *Previous to this Son Warren check I had withheld other deposits to cover the amount of my shortage, the meat company shortage. It is a fact that I started out twelve months after the bank opened withholding* $200.00 *or* $300.00 *worth of checks * * and* that I withheld dozens of deposits, and would replace them from day to day, or week to week, as was necessary to cover it up. * * To boil it down, the Warren deposit of $3,047.16 represented that much of the bank's money that you did not have, or Surghnor did not have." (R. 231).

Witness Glass testified that he and the auditors verified the fact that the A. E. Warren deposit had been made and had not gone to his credit on the book, and that the bank had to reimburse Mr. Warren's account. He testified that the deposit ticket was dated March 27th, and that on April 1st he first learned about the transaction, which he found, and was verified by Davis. He testified that the bank

credited Warren's account with the $3,047.16 out of the bank's fund, and a loss was caused the bank in that amount (R. 269) against which was credited the $511.01 Fort Worth check, which was good (R. 270).

The Surghnor Items
(Items 5, 6, 7, 8 and 10)

These items are designated the Surghnor items, and given joint consideration because the losses sustained by appellee through the dishonesty of Surghnor are therein represented. And at the time Examiner Glass was examining bank, Surghnor handed him five withheld tickets, one a general ledger ticket, covering 10th item, and four covering withheld customers' deposits, and confessed that they comprised his shortage in appellee's bank (R. 262, 263).

The Southland Cotton Oil Company Deposit
(5th Item)

Deposit slip of customer Southland Cotton Oil Company showing deposit in appellee's bank, dated March 19, 1935, in the sum of $1,616.18 (R. 194, 195), the customer's individual ledger sheet, tracing period of March 14, 1935, through April 23, 1935, and the opposite figure of $1,616.18, were in evidence (R. 195). It was stipulated that customer's individual ledger sheet covering period from March 14, 1935, through May 25, 1935, showed that depositor's account did not receive credit for the item of $1,616.18 corresponding to the deposit slip, at any

time, until April 1, 1935, when said account received credit through Glass, appellee's cashier, out of its funds.

Witness Glass testified that this deposit slip, together with other deposit slips (Bell Publishing Co., Thomson Grocery Co., and Bell County Special) were handed him by Surghnor on Monday night, March 31st, saying that they represented his shortage in his cage; that those items were charged to the shortage account of Surghnor, and credited April 1st to respective depositors' accounts; that he gave witness no offset, offsetting cash or checks with these deposit slips, and that it was necessary for appellee to reimburse depositor, which it did; and that no recovery was ever made (R. 196).

The Bell Publishing Company Deposit
(6th Item)

The deposit slip of Bell Publishing Company in appellee's bank of March 2, 1935, in the amount of $1,468.13 (R. 197), customer's ledger sheet for period beginning March 23, 1935, and ending April 17, 1935, the entry thereon under date of April 17, 1935, and the opposite figure in the amount of $1,468.13, were in evidence (R. 198). It was stipulated that ledger sheets of depositor Bell Publishing Company in appellee's bank covering period beginning March 23, 1935, and ending May 6, 1935, did not show that that account received credit in said sum of $1,468.13, being the amount of the deposit shown by said deposit slip until April 1, 1935, at

which time said account was credited in that amount by Glass for the bank, and out of its funds.

Witness Glass testified that the Bell Publishing Company deposit ticket of $1,468.13 made April 1, 1935, and marked "Shortage of H. C. Surghnor, customer's deposit of 3-2-35" was made in witness' hand-writing to reimburse depositor for the deposit (R. 198), which Surghnor stated was one of the deposits that represented his shortage; that this was done for the purpose of crediting depositor's account to reimburse it, for the deposit for which it had never received credit, for the deposit of March 2, 1935. The offsetting charge in the general ledger, and the deposit slip of April 1, 1935, were in evidence (R. 199) as was the customer's pass book (R. 200).

The Thomson Grocery Company Deposit
(7th Item)

Deposit slip of Thomson Grocery Company in appellee's bank in the amount of $1,122.99 (R. 201), customer's pass book, and its individual ledger sheet in appellee's bank showing transactions of March 16, 1935, through April 9, 1935, and the particular date and item of April 1, 1935, and the opposite amount of $1,122.99 (R. 203) were in evidence. It was agreed that the deposit slip as verified by Upleger should be dated March 1, 1935 (R. 203). It was stipulated that individual ledger sheets of customer covering period beginning February 28, 1935, showing no corresponding credit in the amount of the deposit of $1,122.99 until April 1, 1935, when

the account was credited in that amount by Glass for the bank, and out of its funds (R. 203). Customer's pass book was tendered auditor (R. 204).

Bell County Special Account
(8th Item)

The deposit slip for $6,986.00 dated March 29, 1935, to the account of Bell County Special Account, marked "deficiency warrants, rural account" (R. 204), was in evidence, identified by witness Glass, who testified that the same was in Surghnor's handwriting, and was one of the tickets handed him on Sunday night, March 31st, at which time Surghnor stated that the item represented a part, together with others, of his shortage in his cash (R. 205). Individual ledger sheet of Bell County Special Account for period of December 6, 1934, including April 1, 1935, and items thereunder of April 1, 1935, and the opposite amount of $6,986.00 were in evidence (R. 207). It was stipulated that the individual ledger sheets of depositor Bell County Special Account in appellee's bank covering period from September 27, 1934, and until April 1, 1935, nowhere showed a credit for the amount of the deposit in the sum of $6,986.00 until April 1, 1935, when such credit was given by Glass for the bank out of its funds (R. 208).

Witness Glass said that in his testimony he was referring to appellee's general ledger covering the period from January 1, 1935, to December 31, 1935. He testified that the deposit slip for $6,986.00 was handed to him by Surghnor on the night of March

31st, together with others, at which time Surghnor stated that was a part of his shortage and had not been credited; that he handed over no offsetting debit, and on April 1st the account was credited, together with others, and the shortage account was correspondingly charged, and that no recovery was ever made by the bank of any kind on the item (R. 208). The deposit slip for the account of Bell County Special Account in the amount of $6,986.00, March 29, 1935, and the pass book showing that entry during that period in the possession of witness, L. P. Heard, County Auditor of Bell County, Texas, was tendered the examining auditor (R. 208). Witness Hooper testified that with reference to items 5, 6, 7 and 8, he found that they represented credits which had been withheld from depositor's accounts, and appellee had to make them good (R. 223, 224).

Witness Glass testified that on the night of March 31st Surghnor handed him individual deposit tickets of Southland Cotton Oil Company, Bell Publishing Company, Thomson Grocery Company, Bell County Special Account, and a general ledger ticket showing that the bank owned United States Government bonds in the amount of $1,600.00, the Bonner and Sissom bonds; that he traced out these tickets in the bank's records, and found that the bank's four customers had not received credits to which they were entitled (R. 258). He testified that these four individual deposits were on the same footing as the Navratil and Motl suppressed deposits as handled by Lastovica. That both he and Surghnor were working the same device (R. 259).

Barney Sissom and Ida Bonner Bonds
(10th Item)

Employee Davis' cash book, national bank examiner's list of cash items, and general ledger, in custody of the court in Waco, was tendered by the auditors (R. 212). Witness Glass testified that in appellee's general ledger there was:

> "An entry under date of March 22, 1935, under the heading of 'Liberty Bonds,' line four, a charge of $1,600.00 and credit, charged to an account styled 'Liberty Bonds.' Not charged back in—the debit. This arises during the examination if you want the whole story. During the examination of the bank begun by Mr. Shannon and myself on March 21, $1,600.00 of Government Bonds and bonds guaranteed by the Government were found in the cash items of Sam Davis and included in his cash. Mr. Surghnor stated that he bought those bonds that day, and had not had time to enter them into the government bond account. On March 22, the next day, he charged those bonds into the bank's account of Liberty Bonds owned."

> "The examination, as I recall, began on March 21, and the next day, March 22, he made this entry, stating that he had bought the bonds, and had not had time to put them in this account. On the night of March 31 he handed me this general ledger ticket in the amount of $1,600.00 and stated that those bonds had not been bought, and he had not paid for them, but that they belonged to customers, and that $1,100.00 of Home Owners Loan Bonds belonged to Barney Sissom and

$500.00 bond belonged to Mrs. Ida Bonner; that he had taken from the safe keeping files of the bank the $500.00 bond, and had taken the $1,100.00, or some amount in excess of that, from a remittance the Home Owners Loan Corporation had sent to this bank to be delivered to Mr. Sissom on his receipt. He only used part of Barney Sissom's bonds, just enough to make his cash balance. On April 1, at his direction and from what he told me to do, and that these bonds did not belong to the bank, I removed them from the assets of the bank by crediting $1,600.00 under date of April 1, to Liberty Bonds, and offset that by a charge to this account mentioned before, 'Shortage of H. C. Surghnor,' and made a charge of a like amount, $1,600.00. The bonds were taken out of the files of the bank and placed at the disposal of Mrs. Bonner and Mr. Sissom."

"Later on we delivered that $1,100.00 Home Owners Loan bond to Mr. Sissom and issued Mrs. Bonner a safe keeping receipt for her $500.00 bond, which we kept, but not in the assets of the bank; in other words, we delivered the bonds to the claimants. Of the Barney Sissom matter, the Home Owners Loan Corporation matter, we had a regular receipt that they required, and held the bank liable until that receipt was returned to them. Mrs. Bonner had a receipt from H. C. Surghnor, which she surrendered and took the regular safe keeping receipt of the bank." (R. 212, 213).

Witness further testified, on cross examination, that the bonds passed into the bank's assets and were counted as actual assets, although the bonds really belonged to its customers and that Surghnor took

those bonds which the bank did not own, and put them in his cash drawer, counted them as cash, and later charged them into the bond account, as if the bank owned them (R. 214). He declared that at the time Surghnor gave him this item, he handed over a number of deposit slips, and stated that the same comprised his shortage. (R. 214).

Witness Glass testified that the general ledger ticket which Surghnor gave him, at the time the four individual deposit tickets were turned over, showed a general ledger credit that would reduce the amount of Government Bonds owned by the bank $1,600.00 (R. 262); that these bonds known as the Bonner-Sissom bonds first showed up at the time of the examination and upon the examiner's report under the heading of cash items (R. 263); that the bonds were then in Davis' cash as the property of the bank, and were so listed and classed by the examiners as bank's assets (R. 263); and that this was done because of the information Surghnor furnished him (R. 264), who advised that they had been bought that day, and paid by cash, and he had not had time to enter them on the books. He further testified the following day that Surghnor charged them in the bank's bond account, where they were carried until witness reversed the entry and returned the bonds to the rightful owners on April 1 (R. 264). He testified that the bank had no way to pay the owners or deliver the bonds except to take out of the bank's funds a like amount of money and reduce their bond account by taking the bonds out of the bank's assets, which he did, because Surghnor told him that

represented part of his shortage, which was followed by verification that the bonds belonged to Mr. Sissom and Mrs. Bonner (R. 265).

The Bassel Wilson Item
(9th Item)

Customer Wilson's account was charged, on March 8, 1935, $1,647.13. The slip was in evidence (R. 224). Hooper testified that Wilson came into the bank threatening suit because charge was unauthorized; that bank was unable to show any support for charge, nor cancelled checks, or other offsets; that finally Wilson agreed that there might be floating checks against charge, not producible by bank, amounting to $1,185.13, and settlement was made with him for $462.00 (R. 210). Wilson testified:

> "They put a charge against my account of $16,647.13, that is all they had there, and they always held the checks with that, and this time they didn't have no checks; there was no checks with it, and I asked for them." (R. 243).
>
> "They never sent me one of these debit slips before." (R. 235).

Witness Glass testified that auditors checked out the Wilson claim, reducing it to $462.00, and the bank paid him $462.00; that there was a charge, unauthorized by any officer of the bank as far as known, at least no one would admit, no one would admit that he made against his account, no supporting documents, no evidence put in on it to charge his account at all; *that the charge ticket was written on*

a typewriter, with no OK or identifying signature at all on it. The ticket bore no pen mark or anything on it. (R. 268).

This is the sole item in petitioner's suit which is not supported by a confession from one of its employees that he was responsible for the abstraction. Lastovica, Surghnor and Davis admitted perpetration of abstractions in all other nine instances. In this case strong circumstances pointed to the fact that transaction was handled by Davis, because Glass testified that Davis usually handled the account, although he denied knowledge of the Wilson matter (R. 211). Appellee was not required, to fix liability, to identify the responsible employee, for obviously Wilson's account could not have been tampered with except by an employee within the bank; and by the terms of the bond (R. 133) appellee was insured against "any dishonest act, wherever committed, of any of the employees as defined in Section 6 hereof, whether acting alone or in collusion with others." Section 6 defined "employees" to mean officers, clerks and other persons in the immediate employ of the bank during the currency of the bond at its office, etc (R. 135). The time when this loss occurred was the date of the charge slip, March 8, 1935 (R. 224).

Thus, discarding the expert testimony, we submit that the overwhelming preponderance of the evidence established bank's loss as to each of the ten items because it restored that sum of money to its customers, or reimbursed, as in the Lastovica short-

age, its own accounts; because the documentary evidence verified the amounts of the losses, methods of abstraction, the names of the customers whose accounts were short and which had to be reimbursed, and the times when the losses occurred, all within the currency of the bond; and because of the confessions, admissions and testimony of the defaulters, as to all items except the Bassel Wilson shortage, which was established by the customer's testimony, plus the undisputed records. Petitioner, it must be admitted by the bonding company, did sustain losses by the acts of some of its employees at some time, for the shortages in its own and its customer' accounts existed. That these shortages coincided in times and amounts with the admitted abstractions must be most convincing. And we are unable, in the utmost candor, to point to a single line of evidence in the record which shows that the bank's losses were beyond the bond period.

With this testimony in the record, how can it be said that the bank did not suffer diminution of assets, or that the testimony of the experts that its assets were diminished, was not true, or that the admission of the expert testimony prejudiced the bonding company's rights? It may be academically true that if the bank's employees had placed the amounts of present deposits with its cash and given others credit therefor, to cover up money previously withheld, there was simply a switch of liability from the old to the new depositors. But that is not the case presented here, for it is clear that bank's losses, whether from carry-over or not, came into existence

on or after the day it opened for business, within the period of the bond coverage. This must be true, because of the documentary evidence, and the specific testimony of the employees. This must be true, because the bond was effective one day before bank opened, and whatever carryover there was resulted in a then actual present loss to petitioner; and subsequent defalcation must, of necessity, whether fresh or a carryover, have occurred within the stipulated life of the bond.

With the same evidence before it, and with its prior opinion extant the Circuit Court of Appeals, without holding its first opinion manifestly wrong in any particular, and without correction, or criticism, or challenge, by its second decision of reversal, has prolonged interminably this litigation. The decided cases, of which *State of Kansas vs. Occidental Life Ins. Co.*, 95 F. (2d) 935, is an example, are against this procedure.

V.

The Circuit Court Could Not Substitute Its Own Conclusions on the Evidence for the Jury's

The Circuit Court has said that the testimony of the experts was so speculative as not to constitute admissible evidence, and that it invaded the province of the jury. It then proceeded to write that from the testimony of the experts, the jury could have reasonably understood and probably did, that if they believed the same they might render judgment based thereon, while on the other hand if the money actually went into the bank to cover previous shortages, the

statements were not true and the bank suffered no diminution of assets; that the new deposits only served to cover up previous withdrawals, and liability of bank remained the same, being simply switched from old to new depositors. This we believe to be the acme of speculation. What the jury could and probably did understand from such statements was, within their own mental processes not open to outside understanding. The Circuit Court was without authority to determine the effect of what probably went on in the minds of the jury.

"It may be that if we were to usurp the functions of the jury and determine the weight to be given to the evidence, we might arrive at a different conclusion. But this is not our province on a writ of error." *Aetna Life Ins. Co. vs. Ward*, 11 S. Ct. 720.

> "Issues that depend on the credibility of witnesses and the effect of weight of evidence, are to be decided by the jury." *Gunning vs. Cooley*, 281 U.S. 90, 50 S. Ct. 231.

"We do not weigh the evidence; what our verdict would have been as jurymen is immaterial. In our judgment, we cannot say that the jury could not reasonably find, as they have found, that at his discharge, plaintiff was totally and permanently disabeld * *." *United States vs. Dudley*, 64 F. (2d) 743.

> "In the examination of this question, we are not to weigh the evidence; what our verdict would have been, as jury men, is immaterial; it is likewise immaterial that the Court may be of

opinion that the evidence preponderates in favor of the party making the motion—the responsibility of weighing the facts is the jury's." *United States vs. Holland*, 111 F. (2d) 949.

Conclusion

Believing that the testimony of the experts was properly admitted, and that the trial court's charge, as a whole, and not in isolated portions, substantially submitted all the issues, and presented all of the bonding company's defenses, without error, affecting its substantial rights (*Valley Shoe Corp. vs. Stout, et al*, 98 F. (2d) p. 519, et seq; 28 U.S.C.A. Sec. 291), petitioner respectfully prays, as in its foregoing application, for the issuance of a Writ of Certiorari to the United States Circuit Court of Appeals for the Fifth Circuit, that the judgment of said Court be reversed by this Honorable Court, and that the judgment of the trial court be affirmed.

Respectfully submitted,

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